85-439

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeal violated substantive and procedural due process of law and equal protection of the laws principles in its ruling that the defendants Mitchell Brothers' Santa Ana Theater, et al. (hereinafter designated "Mitchell Brothers") were also entitled to recover costs on appeal and to have attorney's fees considered as a part of costs under Civil Code § 3496, where:

(a) the Mitchell Brothers did not follow California statutory procedure and did not file a verified cost bill within the mandatory period set by C.C.P. § 1034 after the second remittitur went down on June 7, 1982 following the Court of Appeal's second judgment in People of the State of California ex rel. Edward Cooper, City Attorney of the City of Santa Ana, California v. Mitchell

Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (Feb. 18, 1982) but instead filed a "Motion to Strike or Tax" (annul) the costs which the Plaintiff was claiming, and ruling case law in California holds such a failure to be fatal to recovery under the California Statute; and

(b) Civil Code § 3496, as it read on January 26, 1983, did not grant the Court a discretion to award an attorney's fee to the losing party whose unlawful public conduct had been enjoined as a result of the action of "the prevailing government agency which brought the action" in the event that the appellate court did not grant the government agency all of the ancillary equitable "relief" the government agency requested as an incidence of its having proved the existance of the

public nuisance and its right to the injunctions and abatement; and

(c) on January 26, 1983, when the trial court was called upon to exercise its discretion in relation to the cost bill which had been timely filed by the City of Santa Ana, the trial court had no attorney's fee issue before it as to the Mitchell Brothers; nor did the Court of Appeal have such an issue before it upon appeal, in that the appeal of the Mitchell Brothers did not raise an issue as to the trial court's discretion to award them attorney's fees as a part of costs; and

(d) the City Attorney of Santa Ana, who has statutory standing under C.C.P. § 731 to represent the class of California citizens residing in Santa Ana in public nuisance

abatement litigation, possessed a civil right under 42 U.S.C. § 1983 and the federal constitution to require that the substantive and procedural due process rights under Civil Code § 3496 be applied in accordance with the state law as it existed on the date the trial judge's discretion was to be exercised; and

(e) the Court of Appeal's ruling lacks Equity, in that it not only lacks support in general equitable principles but, on the contrary, flies in the face of basic, time-honored equitable rules, as applied to the Findings of Fact of the trial judge. See the trial court's Finding of Fact XVI, XVII, XVIII and XIX which are reproduced at Appendix C-16 through C-19 of the Petition for Writ of Certiorari filed in this Court on August 10, 1981 in

People of the State of California ex rel. Edward Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271?

2. Whether the judgment of this Court in California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., (Nov. 30, 1981) 454 U.S. 90, operated as a complete reversal of the first judgment of the Court of Appeal in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 (Jan. 20, 1981) so as to nullify the first remittitur which was filed on May 20, 1981 and the Memorandum of Costs which the Mitchell Brothers prematurely filed on June 1, 1981 following the filing of the first remittitur in the trial court?

3. Whether Rule 26(b) of the California Rules of Court, as applied herein, is arbitrary and capricious and

violates due process of law and equal protection of the laws principles, where the Court of Appeal concluded that the Mitchell Brothers were also a "prevailing party" within the meaning of that term as used in the 1983 amendment to Civil Code § 3496, as amended by Statutes 1983, Chapter 1178, § 1, page 6761, by virtue of the Clerk's notation on the remittitur under Rule 26(a) of the California Rules of Court, where

> (a) the City of Santa Ana's only cause of action was to enjoin and abate certain public nuisances and the judgment that those public nuisances were to be enjoined and abated was affirmed without exception; and only the ancillary "relief" to be accorded the prevailing party, incident to its having prevailed on the Public Nuisance Issue, was affected by the

appeal; and

(b) Rule 26(a) is a Rule of Court derived from a "general act" relating to costs, and Civil Code § 3496 is a "special act" of the legislature relating to costs involving injunctions against obscene materials awarded the prevailing government agencies, both of which are "in pari materia" and to be harmonized and, where conflict exists, the special act (Civil Code § 3496) controls the general act; and

(c) the prevailing case law in analagous situations holds that the right to attorney's fees does <u>not</u> depend upon a party winning on all issues.

4. Whether the Court of Appeal's rulings, which denied the City recovery (restitution) of its "costs on appeal" pursuant to Civil Code § 3496 after having

successfully enjoined 11 obscene public nuisances on appeal, violates the principle of separation of powers and has denied the City of Santa Ana of federal rights of due process of law and equal protection of the laws, including the right of access to the courts, where the basis for denial of such relief was that the City did not prevail on the ancillary issues which were raised by the City in its appeal, (that is, the remedies available to the City after having prevailed in its public nuisance lawsuit); where such ancillary issues were "substantial" and were summarily denied a hearing in the Court of Appeal and in the California Supreme Court without argument?

5. Whether the Court of Appeal erred in refusing to allow the City of Santa Ana, as a part of its "costs on appeal", the reasonable costs of reproduction of the petition for a

successful writ of certiorari in the U.S. Supreme Court which was responsible for and made the City of Santa Ana the "prevailing party" in the State appeal, on the rationale that Rule 50.3 of the U.S. Supreme Court Rules does not permit recovery in the U.S. Supreme Court for the expense of printing such briefs and that therefore such costs, though otherwise "allowable", are precluded because of "preemption" principles?

6. Whether the Court of Appeal ruling that "each party is ordered to bear its own costs, including attorney's fees, on this appeal"; i.e., that the City of Santa Ana was not entitled to costs on its second appeal, pursuant to the provisions of Civil Code § 3496, was arbitrary and capricious and violated due process of law and equal protection of the laws principles, where

(a) the Court of Appeal's

opinion also ruled that the trial court erred in failing to exercise its discretion on January 26, 1983 and upheld the City of Santa Ana's claim on appeal that Civil Code § 3496 applied to costs on appeal; and

(b) Serrano v. Unruh, 32 Cal.3d 621 at 635 expresses the general rule that a "prevailing party" is entitled to an award as to fee-related appeals?

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No.85-

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PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

The petitioner, People of the State of California ex rel. Edward Cooper, City Attorney of the City of Santa Ana (hereinafter designated "City" and "City of Santa Ana"), respectfully prays that a

writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, filed on March 7, 1985.

JURISDICTION

The opinion of the Court of Appeal was filed on March 7, 1985 (see Appendix A-1 thru A-31). A timely petition for hearing in the California Supreme Court was denied on May 29, 1985 (see Appendix A-32). This petition for certiorari was filed within 90 days from the date the judgment became final. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rule 17(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes and constitutional provisions is set forth at Appendix B-1 to B-23 to this petition: California Civil Code §§ 5, 22.5, 3366-

3369, 3479 - 3484, 3490-3495, 3523; California Government Code §§ 38771, 38773 and 38773.5; California Code of Civil Procedure §§ 731, 1021, 1021.5 and 1034; California Civil Code §3496; California Penal Code §§ 311, 311.2, 370, 371, 372 and 373a; First, Ninth, Tenth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

This case was before this Court during the 1981 October Term in Case No. 81-271 on a Petition for Writ of Certiorari which presented three federal questions. Question 1 presented the federal issue as to whether a court order closing a theater, after trial and for past unlawful conduct, was a prior restraint; Question 2, the issue of burden of proof; and Question 3, the issue as to whether the Court of Appeal's Judgment had

deprived the City of Santa Ana and its residents of federal rights in limiting the public nuisance abatement remedy to a personal injunction against a specific film. In a per curiam opinion in Edward Cooper, City Attorney of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. 172 (Nov. 30, 1981), this Court summarily reversed the Court of Appeal's judgment on the "burden of proof" issue, but denied the petition as to Questions 1 and 3.

Six weeks later, however, this Court noted jurisdiction in U.S. Marketing, Inc., et al. v. Idaho, et al., 454 U.S. 1140, 71 L.Ed.2d 291, 102 S.Ct. 996 (Jan. 11, 1982) and agreed to review the "closure" issue presented in Idaho ex rel. Wayne Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (which holds, contrary to the ruling of Trial Judge

Weeks herein and the California Supreme Court in People ex rel. Busch v. Projection Room Theater, et al., 17 Cal.3d 42, that closure of a theater after a trial on the merits does not by itself constitute an unlawful prior restraint upon the exercise of free speech), thereby finding that the "closure" issue presented a substantial federal question which was ripe for review. Thereafter, this Court was precluded from deciding the federal "closure" issue by U.S. Marketing, Inc.'s voluntary dismissal of its appeal under Rule 53, in the face of an opposition motion by the State of Idaho that this Court should, nevertheless, decide the substantial federal question on its own motion. See U.S. Marketing, Inc., et al. v. Idaho, et al., 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649 (Mar. 10, 1982).

Although this Court has discretionary

jurisdiction over federal questions raised in a petition for writ of certiorari, its refusal, in this instance, to hear the "closure" issue on the first petition for writ of certiorari on November 30, 1981 has resulted in the creation of a due process issue at this juncture of this case, where the California Court of Appeal has subsequently relied upon this Court's refusal on November 30, 1981 to hear the "closure" issue (which, at a minimum, now presents a "substantial federal question" under the note of jurisdiction in U.S. Marketing, Inc., supra) in its rationale for denying the City of Santa Ana a reasonable attorney's fee pursuant to Civil Code §3496. Were this Court to subsequently uphold "closure" on the principle stated by the Idaho Supreme Court, or hold that some "monetary award or sanction is proper in lieu of closure", see Associate Justice Cruz Reynoso

dissenting in People ex rel. Van de Kamp v. American Art Enterprises, Inc., 33 Cal.3d 328 at 338, 188 Cal.Rptr. 740 at 747 (Jan. 31, 1983), then this Court's denial of the "closure" issue in the first petition for writ of certiorari on November 30, 1981 will have deprived the Petitioners of rights to which it would otherwise have been entitled, without due process of law. For that reason, this Court should grant the petition for writ of certiorari herein and determine whether or not the Court of Appeal's ruling was justified; that is, decide the underlying issue as to whether "closure" or a "monetary award or sanction in lieu of closure" is unlawful or is proper under federal law.

The City of Santa Ana contends in this petition for writ of certiorari that the opinion below on the issue of "prevailing party" erroneously fails to

distinguisn between the "right" which is being asserted by the City, see Slater v. Blackwood, 15 Cal.3d 791 at 795-796, 126 Cal.Rptr. 225 at 226-227 (1975) and the ancilliary "remedies" which attend that "right". The City's cause of action is a "Complaint in Equity For An Injunction and To Abate a Public Nuisance." The "remedies" (compensatory damages, constructive trust, closure, bond for attorney's fees in lieu of closure, etc.) which were sought in the trial court and upon appeal were ancillary to its cause of action and became available as "remedies" only if and after the City prevailed in its cause of action. Here, the City of Santa Ana clearly "prevailed" because the Court of Appeal did affirm the City's "right" to injunctions and abatement of the public nuisances. All 11 "injunctions" were upheld-- further, as to those films which had not been enjoined,

the same were remanded by the Court for retrial on the "right" being asserted by the City in its cause of action-- the right to an injunction and abatement of the public nuisance.

In support of its rationale that the City's claim for a reasonable attorney's fee was defective because it had only "prevailed" on the one issue, the Court of Appeal cited Kytasty v. Godwin (1980) 102 Cal.App.3d 762, wherein the trial court gave judgment for defendants upholding the defendants' right to a 60-foot easement which on appeal was modified to grant an 8 to 12 foot easement to be determined on remand. (See Appendix A-24.) The City submits that Kytasty is not in point in this case. There the "right" asserted was a right to a 60 foot easement which was diminished to an 8 to 12 foot easement to be determined on remand. Here, the "right" asserted by the City of Santa Ana

was a right to an injunction against the films which were being exhibited and abatement on the grounds that such films were public nuisances. That "right" was affirmed undiminished.

An analogy can be drawn to a negligent injury lawsuit involving the issue of comparative negligence. In proving contributory negligence, a defendant does not establish an affirmative personal right, to which he is entitled independent of the plaintiff's cause of action, nor is he considered as having "prevailed" in the lawsuit or being entitled to an apportionment of costs. See Hyatt v. Sierra Boat Co., 79 Cal.App.3d 325 at 347-350, 145 Cal.Rptr. 47 at 60-62 (1978). The law is clear that where a plaintiff has won substantial relief, it has "prevailed". The City should not have its costs reduced and attorney's fees denied simply because the

court did not adopt each contention raised. Slayton v. Pomona Unified School District, 161 Cal.App.3d 538, 207 Cal. Rptr. 705 at 710 (Nov. 1, 1984) citing Hensley v. Eckerhart, 461 U.S. 424, 71 L.Ed.2d 40, 55, 103 S.Ct. 1933. The Court's rationale flies in the face of the legislative intent expressed in Civil Code § 3496 which does not draw that distinction.

Further, the opinion below gives no consideration whatsoever to the important governmental interest which is involved in the City's underlying lawsuit -- the abatement of moral public nuisances-- brought upon the specific order of the city's legislative body, see California Civil Code §§ 5, 22.5, 3366-3369, 3479-3484, 3490-3495, 3523; California Government Code §§ 38771, 38773 and 38773.5; California Code of Civil Procedure §731; California Civil Code §3496; California

Penal Code §§ 311, 311.2, 370, 371, 372 and 373a at Appendix B-1 through B-23, nor does it apply the time-honored principles of Equitable Jurisprudence such as the "clean hands" doctrine.

While the opinion does indicate that it has considered the "Expanded Statement of Facts" and arguments which were presented in "Cross-Appellant's Opening Brief" in the first appeal, it has done so only in a negative sense, see the text and footnotes 5 and 6 at page 14 of the Court's opinion. Relative to its claim that the Court of Appeal erred in failing to consider the important governmental interest which is involved, the City of Santa Ana asks this Court to take judicial notice of the expanded statement of facts which appears in Cross-Appellant's Opening Brief, see Weiner v. Mitchell, Silberberg and Knupp, 114 Cal.App. 3d 39, 170 Cal.Rptr. 533 at 536 (1981), a copy of

which is on file in this Court in No. 81-271, and of the pertinent facts stated in the following appellate opinions as such relate to the equities of the respective parties to these appeals:

(1) People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, etc., et al., 101 Cal.App.3d 296, 161 Cal.Rptr 562 (Jan. 22, 1980). Hearing denied May 7, 1980,

(2) People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 (Jan. 20, 1981). Hearing denied May 13, 1981,

(3) People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 118 Cal.App.3d 863, 173 Cal.Rptr. 476 (April 16, 1981),

(4) People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (Feb. 18, 1982). Hearing denied May 27, 1982,

(5) Jartech, Inc., et al. v. Clancy,

et al., 666 F.2d 403 (Jan. 25, 1982).

The above cases and historic facts demonstrate that, for the past ten (10) years, the Mitchell Brothers have continuously exhibited hard-core pornography at the Santa Ana Theater as its regular and only course of business. Although the City has prevailed in all of the above lawsuits regarding the issue of the obscene and unlawful nature of the subject matter being exhibited, and those decisions hold that the injury to the City of Santa Ana is irreparable, the judicial relief accorded herein is virtually nonexistent. See the Court of Appeal's opinion in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, 118 Cal.App. 3d 863 at 871, 173 Cal.Rptr. 476 at 479-480, reading:

> "If the motion pictures currently under preliminary injunction are later found to be obscene, their exhibition now would be a wrong 'of a

> repeated and continuing character' and, since a permanent injunction is the only relief to which the plaintiff is entitled in this case (Gow II, Supra 114 Cal.App.3d at pp 930-933, 171 Cal.Rptr. 85) no damages at all could be computed. The injury alleged by the plaintiff is irreparable in nature." (Our emphasis.)

The City submits that in light of the extended ten (10) year record of historic facts noted above the Court's opinion, in failing to weigh in the balance the important governmental interest which is involved in the underlying lawsuits and appeals herein and to apply basic principles of Equitable Jurisprudence, constitutes a clear abuse of discretion, violates the principle of separation of powers, and has denied the City of Santa Ana of its federal rights under due process of law and equal protection of the laws, including the right of access to the Courts. Ryland v. Shapiro, 708 F.2d 967 at 971-972 (CA 5, 1983), and deprivation of its lawful "right to maintain a decent

society" (Paris Adult Theatre v. Slaton, 413 U.S. 49 at 69), and damage to "the quality of life and the total community environment, . . . and, possibly, the public safety" of the United States (Paris Adult theatre, supra, at 58).

STATEMENT OF FACTS

The following short titles are used hereinafter: "R.T." for Reporter's Transcript; "C.T." for Clerk's Transcript.

A. THE MITCHELL BROTHERS' FIRST APPEAL.

The City of Santa Ana, prevailed in the Court of Appeal on the Mitchell Brothers' appeal from the five thousand dollar ($5,000.00) discovery sanction, and from that part of the "Judgment After Trial by Court" which enjoined the Defendants from advertising or exhibiting the eleven (11) films found by the trial court to be obscene beyond a reasonable

doubt. See People ex rel. Gow v. Mitchell Brothers', etc., 114 Cal.App.3d 923, 938, 171 Cal.Rptr. 85, 94. The Mitchell Brothers' Petition for a Hearing in the California Supreme Court on such issues was dismissed for failure to file a timely petition.

B. THE CITY OF SANTA ANA'S FIRST APPEAL.

The City of Santa Ana cross-appealed from both the "Judgment on Verdicts in Open Court" and the "Judgment After Trial By Court" on a number of grounds, including a claim that the trial court erred during the bifurcated jury trial and during the court trial of the equity issues in employing a "beyond a reasonable doubt" rather than a "clear and convincing evidence" standard (burden of proof) in determining the obscenity issue.

The Mitchell Brothers initially prevailed in the Court of Appeal on the

City's cross-appeal as to whether the trial court had employed an improper burden of proof standard ("beyond a reasonable doubt"). See People ex rel. Gow v. Mitchell Brothers', etc., 114 Cal.App.3d 923 at 935, 171 Cal.Rptr. 85 at 92 (Jan. 20, 1981, hearing denied May 13, 1981). On the City of Santa Ana's Petition for a Writ of Certiorari, this Court granted its writ on the "burden of proof" issue and reversed the first judgment of the Court of Appeal, both as to the "Judgment on Verdicts in Open Court" and the "Judgment After Trial By Court", holding that in Civil Public Nuisance Abatement Lawsuits the Federal Constitution did not require the City of Santa Ana to prove beyond a reasonable doubt that the motion pictures at issue were obscene, and that the choice of whether to require proof beyond a reasonable doubt in such cases was solely

a matter of State law and was not a requirement of the First and Fourteenth Amendments. See Edward Cooper, City Attorney of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., 454 U.S. 901, 70 L.Ed.2d 262, 102 S.Ct. 172 (Nov. 30, 1981). Upon remand, the Court of Appeal reversed itself and held that the trial court had erred (C.R. 27, lines 5-7). The second judgment of the Court of Appeal held that the California Constitution does not require that the issue of obscenity vel non in a public nuisance abatement action be proven beyond a reasonable doubt, that the proper standard of proof of obscenity under the State Constitutions was the "clear and convincing evidence" standard, and "reiterated" its earlier opinion on the remaining issues including the issue of the obscenity of the eleven (11) films and the Five Thousand Dollar ($5,000.00)

sanctions (C.T. 27, lines 10-12). The Court of Appeal remanded the case to the trial court for further proceedings as to whether the remaining films are obscene under the "clear and convincing evidence" standard (C.T. 27, lines 9-12).

The City of Santa Ana's Petition for Hearing in the California Supreme Court was denied by this Court on May 27, 1982.

The Court of Appeal's remittitur which was filed with the Clerk of the Orange County Superior Court on June 7, 1982 simply stated "Respondents to Recover Costs on Appeal" (C.T. 28).

C. THE CITY OF SANTA ANA'S "MEMORANDUM OF COSTS ON APPEAL".

On July 6, 1982, the City of Santa Ana filed its "Memorandum of Costs on Appeal" and Points and Authorities in Support Thereof (C.T. 29 et seq.) in which it claimed attorney's fees as a part of costs (C.T. 29 et seq.).

D. THE MITCHELL BROTHERS' MOTION TO STRIKE OR TAX COSTS.

On July 23, 1982, the Mitchell Brothers filed a Notice of Motion to Strike or Tax Costs. (C.T. 36 et seq.).

E. THE CITY OF SANTA ANA'S MOTION FOR AN AWARD OF AN ATTORNEY'S FEE ON APPEAL, PURSUANT TO SERRANO V. PRIEST AND C.C.P. § 1021.5.

On September 8, 1982, the City of Santa Ana filed a Notice of Motion For An Award of an Attorney's Fee on Appeal, pursuant to Serrano v. Priest, 20 Cal.3d 25, 50, 569 P.2d 1303, 141 Cal.Rptr. 315, 329 (Nov. 17, 1977) and C.C.P. § 1021.5, and Points and Authorities and Declaration in Support Thereof (C.T. 52 et seq.).

The City of Santa Ana's alternative pleadings in its Motion and Memorandum of Costs on Appeal claimed a right to a reasonable attorney's fee as the "prevailing party" on appeal under the "private attorney general" theory. See

Serrano v. Priest, supra, and C.C.P. § 1021.5. Procedurally, such claim was made both by separate motion, and as a part of Plaintiff's Memorandum of Costs on Appeal. See Moulin Elec. Corp. v. Roach, 120 Cal.App.3d 1069, 1070 at fn. 2, 175 Cal.Rptr. 111 at 112, fn. 2 (June 26, 1981). See, also, Mandel v. Myers, 29 Cal.3d 531 at 545, fn. 7; 174 Cal.Rptr. 841 at 849, fn. 7.

F. THE CITY OF SANTA ANA'S CLAIMS UNDER CIVIL CODE § 3496.

At the oral argument before Judge Garland on September 20, 1982, the City of Santa Ana advanced additional contentions relating to the right to an award of a reasonable attorney's fee, in reliance upon newly enacted Civil Code § 3496. See R.T. for September 20, 1982 at page 6, lines 3-26. See, also, the City of Santa Ana's additional Points and Authorities filed with permission of the Court on

September 27, 1982 (C.T. 70-71 and 79, line 2 through 81, line 6).

G. ON JANUARY 26, 1983, JUDGE GARLAND REFUSED TO EXERCISE THE DISCRETION AUTHORIZED BY CIVIL CODE § 3496 AND RULED THAT C.C.P. § 1021.5 IS INAPPLICABLE.

On January 26, 1983, Pro Tem Judge Jeffrey Garland filed his minute order which denied the City of Santa Ana's Motion for a reasonable Attorney's Fee on appeal on the grounds that C.C.P. § 1021.5 expressly states it is not applicable to claims in favor of public entities, and that Civil Code § 3496 does not appear to vest trial courts with authority to award fees incurred on appeal, but only contemplates discretionary fee awards upon judgment at the trial level. Judge Garland's order allowed the City of Santa Ana's costs as the prevailing party upon both appeals but denied the costs incurred in the successful writ of certiorari

proceedings before the U.S. Supreme Court (C.T. 100).

On March 22, 1983, the Mitchell Brothers filed a notice of appeal "from that portion of the order made and entered in the above-entitled action on January 26, 1983 denying Defendants' motion to tax costs". The Mitchell Brothers' Opening Brief was filed on or about December 5, 1983 and its Reply to Respondent's Brief was filed on or about February 28, 1984. On or about February 28, 1984, the Mitchell Brothers also filed a "Motion to Augment Record" and attached a copy of its "Memorandum of Costs and Disbursements" for $29,082.84, filed in the trial court on June 1, 1981, following the filing of the remittitur on the Court of Appeal's first judgment. Among other things, the memorandum requested $16,200.00 as rental fees for the 17 films which it had placed in evidence at the trial (11 of which had

been held to be obscene). The Court of Appeal later granted the motion to augment.

On March 28, 1983, the City of Santa Ana filed a notice of appeal from Judge Garland's January 26, 1983 Order denying plaintiff's Motion for an Attorney's Fee on Appeal and granting Defendants' Motion to Tax Costs as to Attorney's Fees and Costs incurred in proceedings before the U.S. Supreme Court. The City of Santa Ana's Opening Brief was filed on December 7, 1983.

H. QUESTIONS PRESENTED IN THE CITY OF SANTA ANA'S OPENING BRIEF.

(a) Whether the City of Santa Ana, as the prevailing party in the appeal and cross-appeal from the judgment in the civil public nuisance (obscenity) abatement lawsuit, is entitled to a reasonable attorney's fee on appeal under (1) Serrano v. Priest, 20 Cal.3d 25, 50,

(2) C.C.P. § 1021.5, and (3) Civil Code § 3496.

(b) Whether Rule 26(c)(2) of the California Rules of Court which authorizes the recovery of "reasonable cost of printing or reproduction of briefs by other process of duplication" by the prevailing party upon appeal includes the "reasonable cost of printing or reproduction of" a petition for writ of certiorari filed by the City of Santa Ana in the U.S. Supreme Court which was successful and which resulted in the plaintiff becoming the "prevailing party" in the final judgment in the State lawsuit.

I. THE COURT OF APPEAL RULING ON MARCH 7, 1985.

On March 7, 1985, the Court of Appeal filed its opinion wherein it reversed the trial court's order which awarded costs to the City of Santa Ana as the prevailing

party in both appeals and held that the Mitchell Brothers were also a prevailing party under Rule 26(b) "because they have obtained a partial reversal of the judgment". The Court ruled that the City of Santa Ana was to recover the costs of its appeal and the Mitchell Brothers were to recover costs of their appeal, and that the costs were to be apportioned on the basis of the portions of the transcripts and briefs devoted to each appeal. The Court also ruled at page 12 of its opinion that:

> ". . . in view of the subsequent enactment and amendment of Civil Code section 3496, both parties, having prevailed on appeal, became entitled to have attorney's fees considered as a part of costs. Because this court had decided neither entitlement nor amount, the trial court had full discretion to determine both issues on the motion to tax costs. In view of its determination that section 3496 does not authorize attorney's fees on appeal, it appears that the trial court failed to exercise its discretion.
>
> " Nevertheless, because we are

> convinced that as a matter of law the proper result was reached, it will be unnecessary for the trial court to reconsider this issue on remand." (Our emphasis.)

and thereafter held that the City of Santa Ana was not entitled to an attorney's fee because; (1) "although plaintiff raised more than twenty issues on its appeal, it ultimately prevailed on only one issue asserted in its appeal. Defendants prevailed on four issues raised in its appeal. . ." and (2) ". . . when fees are unreasonably inflated, the trial court may reduce the award or deny one altogether."

The court also held that the trial court had correctly denied the City of Santa Ana's request for costs of printing its petition for writ of certiorari in the U.S. Supreme Court on pre-emption grounds.

SUMMARY OF ARGUMENT

I

The Court of Appeal's ruling that the

Mitchell Brothers were entitled to recover "costs on Appeal" and to have attorney's fees considered as a part of "costs on appeal" under Civil Code §3496 violated substantive and procedural due process of law and equal protection of the laws.

The Court of Appeal abused its discretion and violated the doctrine of separation of powers in refusing to follow the will of the legislature and apply the language of Civil Code §3496 according to its plain meaning.

The Court of Appeal erred as a matter of law in extending the benefits of Civil Code §3496 to a malefactor.

The Mitchell Brothers did not file the mandatory verified cost bill on appeal. That failure is fatal to their claim.

The Mitchell Brothers' appeal did not raise any issue as to the trial court's discretion to award them an attorney's fee

as a part of costs on appeal.

The "discretion" to be exercised by the trial court relates to the interpretation to be given to Civil Code §3496 on January 26, 1983.

The Court of Appeal statement that the Mitchell Brothers' motion to tax the City of Santa Ana's cost bill on appeal invests the trial court with jurisdiction to grant costs on appeal and attorney's fees to the Mitchell Brothers without complying with California procedure which requires the filing of a mandatory cost bill is an ipse dixit pronouncement which is contrary to ruling case law.

II

The judgment of this Court in California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al. on November 30, 1981 operated as a complete reversal of the Court of Appeal's first

judgment on April 16, 1981 so as to nullify the first remittitur and the Mitchell Brothers' premature cost bill filed on June 1, 1981.

III

The Court of Appeal ruling that the Mitchell Brothers were a "prevailing party" by virtue of Rule 26(b) is arbitrary and capricious and in violation of due process of law and equal protection of the laws and the doctrine of separation of powers. Civil Code §3496, as a "special" statute on "costs" controls Rule 26(b) which is a rule of court derived for a "general" statute on costs.

IV

All of the ancillary issues had substantial merit. The summary treatment accorded those issues by the Court of Appeal does not warrant the harsh penalty

exacted for the City's having pursued its legal right to raise such questions in the courtroom.

V

There is no rational reason for precluding recovery in the state court for the cost of a successful petition for writ of certiorari in the U.S. Supreme Court which made the Plaintiff the prevailing party.

VI

The City of Santa Ana is entitled to costs, including a reasonable attorney's fee on this second appeal.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEAL'S RULING THAT THE MITCHELL BROTHERS WERE ENTITLED TO RECOVER "COSTS ON APPEAL" AND TO HAVE ATTORNEY'S FEES CONSIDERED AS A PART OF "COSTS ON APPEAL" UNDER CIVIL CODE §3496 VIOLATED THE DOCTRINE OF SEPARATION OF POWERS AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

A. THE COURT OF APPEAL ABUSED ITS DISCRETION AND VIOLATED THE DOCTRINE OF SEPARATION OF POWERS IN REFUSING TO FOLLOW THE WILL OF THE LEGISLATURE AND APPLY THE LANGUAGE OF CIVIL CODE § 3496 ACCORDING TO ITS PLAIN MEANING.

Having correctly ruled that Civil Code § 3496 applied to "costs on appeal" as well as "costs at trial", and that the trial court had erred in failing to exercise its discretion under Civil Code § 3496, the Court of Appeal then "abused" its discretion and violated the doctrine of separation of powers by failing to heed the will of the Legislature and apply the language of the statute according to its plain meaning. Sutherland Statutory

Construction, Sands, Vol. 2A at pgs. 48-68.

The language of the statute is clear--all that is required for a complete understanding as to its operation is a simple reference to current obscenity litigation and the problem that has confronted public entities in the public nuisance area-- that of the exclusion in C.C.P. § 1021.5 as to "public entities" which, when "strictly" applied, has unjustly hampered government in its functions.

The legislative reference and background is explained in two paragraphs of a letter written by the Counsel of Record herein, James J. Clancy, to Santa Ana City Attorney Edward Cooper, dated September 10, 1982, reference to which appears in the Clerk's Transcript at page 127. That paragraph reads as follows:

" The history of Senate Bill No.

1720 is rather interesting. When we learned that the "closure" issue of the Idaho Moral Nuisance Statute would be reviewed by the United States Supreme Court in Idaho v. U.S. Marketing, I asked State Senator Russell to introduce a California version of the same in the California legislature. He is the State Senator from my District (21st District) and has led the fight for stronger obscenity legislation. When appellant U.S. Marketing dismissed its appeal and prevented the United States Supreme Court from ruling on the Idaho statute, I recommended that the Idaho draft be abandoned and that the nuisance statute recently passed by the State of Washington (after the decision in Brockett v. Spokane Arcades, Inc., No. 80-1064, ___ U.S. ___ Nov. 9, 1981) be substituted in its place. The Washington State version was passed by the California Senate but was stopped "dead" in the Assembly. At the first hearing before the Assembly Committee, I argued privately to the attorney for the Assembly Committee that the Santa Ana result was an incredible injustice and that at the very least the City, having succeeded in obtaining the injunctions, should have been reimbursed for its costs. Based upon our conversations, I recommended that the Washington State version be abandoned and that this simple amendment, adding Civil Code Section 3496, be substituted in place thereof, using the word 'shall.'

" The Committee accepted the proposed amendment, except for the

> word 'shall' which was changed to read 'may.' Thereafter, Senator Russell was able to get it through both the Senate and the Assembly!!! I was astounded when I heard that he had succeeded."

In enacting Civil Code § 3496, the State Legislature was simply indicating that it wanted to address the interpretation reached by the California courts in People ex rel. Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (May 27, 1982)[2/] and grant a specific type of affirmative relief; i.e., make it possible for a city to be reimbursed for the costs it incurred when it was successful in litigation to enjoin and abate (obscenity) public nuisances.

The language clearly indicates an intent to favor local government agencies

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2/ The testimony of James J. Clancy, referred to above, was given before the Assembly Criminal Justice Committee in Sacramento at 5:00 p.m. on June 29, 1982.

in such moral public nuisance abatement lawsuits, a matter which presents no real constitutional problem, State of Idaho ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Supreme Ct., Idaho, 1981). The remedy which is given goes beyond "a reasonable attorney's fee" and includes "costs of investigation" evidencing an intent to reimburse the City for the "government" costs it has expended in undertaking and achieving a result which has benefitted the general public and the public welfare.

B. THE COURT OF APPEAL ERRED AS A MATTER OF LAW IN EXTENDING THE BENEFITS OF CIVIL CODE § 3496 TO A MALEFACTOR.

Because the language of Civil Code § 3496 is clear that the legislature intended to benefit local government and correct an unjust result, it seems equally clear that the statute cannot fairly be read to infer a benefit to the malefactor

Mitchell Brothers which would nullify the effect of the specific affirmative relief granted to the government agency.

It is implausible to believe that the legislature intended to withdraw the benefit for achieving a public good, in the event the trial court did not grant the government agency all of the ancillary equitable relief the government agency requested as an incidence of its having proved the defendant was a malefactor. Had the State Legislature intended that result, it would have specified the same in language as clear as that used to confer the benefit on the government agency.

C. THE MITCHELL BROTHERS DID NOT FILE THE MANDATORY VERIFIED COST BILL ON APPEAL. THAT FAILURE IS FATAL TO THEIR CLAIM.

The Court of Appeal did not have jurisdiction to rule that the Mitchell Brothers were also entitled to have

attorney's fees considered as a part of costs under Civil Code § 3496. That issue was not before the trial court on January 26, 1983 at the time that it was required to exercise its discretion regarding Civil Code § 3496.

The Mitchell Brothers did not file a verified cost bill after the second remittitur went down on June 7, 1982 following the Court of Appeal's second judgment in People of the State of California ex rel. Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (Feb. 18, 1982). See Statement of Facts, supra, at page 20 and Appendix B-12. That failure is fatal to their claim. See Witkin, Procedure 2d, p. 4523. Although Witkin notes that the Court has the usual power under C.C.P. § 473 to relieve from delay caused by mistake, inadvertence or excusable neglect, the Mitchell Brothers

did not attempt that route nor could they have met the requirements of C.C.P. §473.

D. THE MITCHELL BROTHERS' APPEAL DID NOT RAISE ANY ISSUE AS TO THE TRIAL COURT'S DISCRETION TO AWARD THEM AN ATTORNEY'S FEE AS A PART OF COSTS ON APPEAL.

Nor did the Court of Appeal have jurisdiction of such an issue upon appeal. The Mitchell Brothers' appeal on March 22, 1983 was from the January 26, 1983 order denying their motion to tax costs. See Statement of Facts, supra, at page 21. The Mitchell Brothers' appeal did not raise an issue as to the trial court's discretion to award them an attorney's fee as a part of costs. (Nor did their "Memorandum of Costs and Disbursements", filed prematurely on June 1, 1981, contain any claim as to an attorney's fee).

E. THE "DISCRETION" TO BE EXERCISED BY THE TRIAL COURT RELATES TO THE INTERPRETATION TO BE GIVEN TO CIVIL CODE §3496 ON JANUARY 26, 1983.

Further, the issue in this case relates to the interpretation to be given to Civil Code § 3496 on January 26, 1983, not at some later date which would be affected by a subsequent amendment. Having failed to exercise its discretion on that specific date, the trial court's discretion is to be exercised in the light of Civil Code § 3496 as it existed on January 26, 1983. Petitioner submits that, in so far as this lawsuit is considered, the City Attorney of the City of Santa Ana, acting on behalf of the citizens of Santa Ana, possesses a civil property right in that determination, Pulliam v. Allen, ___ U.S. ___, 80 L.Ed.2d 565 (May 14, 1984).

F. THE COURT OF APPEAL STATEMENT THAT THE MITCHELL BROTHERS' MOTION TO TAX THE CITY OF SANTA ANA'S COST BILL ON APPEAL INVESTS THE TRIAL COURT WITH JURISDICTION TO GRANT COSTS ON APPEAL AND ATTORNEY'S FEES TO THE MITCHELL BROTHERS WITHOUT COMPLYING WITH CALIFORNIA PROCEDURE WHICH REQUIRES THE FILING OF A MANDATORY COST BILL IS AN IPSE DIXIT PRONOUNCEMENT WHICH IS CONTRARY TO RULING CASE LAW.

The Court of Appeal's statement that "the trial court had full discretion to determine both issues on the motion to tax costs" (opinion, page 12, lines 16-17) is unsupported by case authority, "The Court of Appeal is not a policy making body and is therefore required to follow existing statutory and case law." Hyatt v. Sierra Boat Co., 79 Cal.App.3d 325 at 349. Nor can it be supported on equitable principles. The Mitchell Brothers clearly are malefactors and lack "clean hands". See the trial court's Finding of Fact XVI, XVII, XVIII and XIX which are reproduced at footnote 9 in the City of Santa Ana's argument in the Petition for Hearing filed

in this Court on or about March 27, 1982 as 4 Civ. 19940.

II

THE JUDGMENT OF THIS COURT IN CALIFORNIA EX REL. COOPER V. MITCHELL BROTHERS' SANTA ANA THEATER, ET AL. ON NOVEMBER 30, 1981 OPERATED AS A COMPLETE REVERSAL OF THE COURT OF APPEAL'S FIRST JUDGMENT ON APRIL 16, 1981 SO AS TO NULLIFY THE FIRST REMITTITUR AND THE MITCHELL BROTHERS' PREMATURE COST BILL FILED ON JUNE 1, 1981.

Under the general rule, upon reversal of the first judgment, that judgment ceased to exist for any purpose. Cowdery v. London & San Francisco Bank, 139 C. 298, 73 P. 196; 5 Cal.Jur.3d Appellate Review at page 302. With the judgment vacated, incidental matters, proceedings, or claims based upon the judgment are likewise nullified, Witkin, Procedure 2d, pg. 4483. Reversal has the same effect on a prior claim for costs, which are incident to the judgment. Monson v. Fisher, 219 C. 290, 26 P. 6 (1933).

III

THE COURT OF APPEAL RULING THAT THE MITCHELL BROTHERS WERE A "PREVAILING PARTY" BY VIRTUE OF RULE 26(b) IS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE DOCTRINE OF SEPARATION OF POWERS. CIVIL CODE § 3496, AS A "SPECIAL" STATUTE ON "COSTS" CONTROLS RULE 26(b) WHICH IS A RULE OF COURT DERIVED FROM A "GENERAL" STATUTE ON COSTS.

The Court of Appeal's holding that the Mitchell Brothers "are still the prevailing party because they have obtained a partial reversal of the judgment" is predicated upon Rule 26(b) of the California Rules of Court. Rule 26(b), however, is derived from a "general" statute on costs and Civil Code § 3496 is a "special" statute on costs. It is a cardinal rule of statutory construction that where a general and a special statute are in pari materia, the special statute controls. Sutherland Statutory Construction, Sands, Vol. 2A at § 51.05, page 315.

The City of Santa Ana is clearly the prevailing party in so far as the attorney's fee provision authorized by Civil Code § 3496 is concerned. The prevailing case law in analagous situations holds that the right to attorney's fees does not depend upon a party winning on all issues.

The City of Santa Ana's only cause of action was to enjoin and abate certain public nuisances and the judgment that those public nuisances were to be enjoined and abated was affirmed without exception. Only the ancillary "relief" to be accorded the prevailing party, incident to its having prevailed on the public nuisance issue, was affected by the appeal. The City should not have its costs reduced or attorney's fees denied simply because the Court did not rule in favor of the City on each issue litigated and adopt each contention raised. Inmates of the Maine

State Prison v. Zitney, (U.S.D.C., D. Maine, 1984) 590 F.Supp. 979 at 983. Folsom v. Butte County Assn. of Governments, 32 Cal.3d 668 at 685, 186 Cal.Rptr. 589, Matter of Estate of Schuster, 163 Cal.App.3d 337, 209 Cal. Rptr. 289 at 293 (1984), Slayton v. Pomona Unified School Dist., 161 Cal.App.3d 538, 207 Cal.Rptr. 705 at 710 (Nov. 1, 1984) citing Hensley v. Eckerhart, 461 U.S. 424, 71 L.Ed.2d 40, 55, 103 S.Ct. 1933.

The Court's rationale violates the separation of powers concept and flies in the face of the legislative intent expressed in Civil Code § 3496, which does not draw that distinction.

IV

ALL OF THE ANCILLARY ISSUES HAD SUBSTANTIAL MERIT. THE SUMMARY TREATMENT ACCORDED THOSE ISSUES BY THE COURT OF APPEAL DOES NOT WARRANT THE HARSH PENALTY EXACTED FOR THE CITY'S HAVING PURSUED ITS LEGAL RIGHT TO RAISE SUCH QUESTIONS IN THE COURTROOM.

The Court of Appeal's rulings which deprived the City of recovery (restitution) of its "costs on appeal" pursuant to Civil Code §3496, for having successfully enjoined 11 "obscenity" public nuisances, violates the separation of powers doctrine and has denied the City of Santa Ana due process of law and equal protection of the laws. The Court's basis for that denial was that the City did not prevail on what the City claims are the ancillary issues--the remedies available to the City, after having prevailed in its public nuisance lawsuit.

Those ancillary issues had substantial merit, and involved three problem areas. The first problem area involved

the federal issue of "closure" of the premisis as a penalty for past conduct in which the trial court found that, upon the trial facts, it would have closed the theater had such been possible under federal law. This Court refused to review that question on the City's first petition for writ of certiorari, notwithstanding a unanimous Idaho Supreme Court decision holding that "closure" as a penalty for past conduct did not violate federal law, and this Court later agreed to hear, but did not decide, that "substantial federal question" when the Idaho appeal was withdrawn by the appellants. The second problem area involved the City's right to recover damages under C.C.P. §731 and People v. City of Los Angeles, 160 Cal.App.2d 494 at 500 (May 15, 1958), petition for hearing in the California Supreme Court denied on July 11, 1958, which holds that damages can be recovered

by a City under C.C.P. §731. That "stare decisis" precedent was brought to the attention of both the Court of Appeal and the California Supreme Court in a Petition for Hearing which both, nevertheless, refused to consider or distinguish the same. The third problem area involved a multitude of errors allegedly occured in the trial of the issue of obscenity to the jury. Those errors were raised by the City in the background of its primary claim that a jury issue had not been properly raised. The City achieved a reversal of the "Judgment on the Jury Verdicts" in this Court on one of those grounds (burden of proof) which obviated the need for further argument on the remaining jury issues.

Although all of the above ancillary issues had substantial merit, they were summarily denied a hearing in the Court of Appeal and in the California Supreme Court

without argument. That type of treatment does not warrant the harsh penalty which the Court of Appeal exacted for the City's having pursued its legal right to raise such questions in the courtroom.

V

THERE IS NO RATIONAL REASON FOR PRECLUDING RECOVERY IN THE STATE COURT FOR THE COST OF A SUCCESSFUL PETITION FOR WRIT OF CERTIORARI IN THE U.S. SUPREME COURT WHICH MADE THE PLAINTIFF THE PREVAILING PARTY.

Sacramento M.U. Dist. v. P. G. and E. Co., (1942) 20 Cal.2d 684, 690, does not require a denial of plaintiff's request for costs of printing its successful petition in the U.S. Supreme Court on preemption grounds. See Appendix A-29. A rule which places the cost of a petition on the losing party does not "penalize the free access to the federal courts". On the contrary, a person contemplating the filing of a petition for writ of certiorari in this Court for unconstitu-

tional conduct engaged in by a state court would be encouraged to seek access to the federal court by the realization that he will recover the costs of a successful petition in the state court which has made him the "prevailing party" in the state litigation.

VI

THE CITY OF SANTA ANA IS ENTITLED TO COSTS, INCLUDING A REASONABLE ATTORNEY'S FEE ON THIS SECOND APPEAL.

The Court of Appeal's ruling (see Appendix A-30) that the City of Santa Ana, having established that the trial court erred and that Civil Code § 3496 applies to costs on appeal, nevertheless is not entitled to costs including attorney's fees under Civil Code § 3496 is inconsistent with the public policy expressed in Serrano v. Unruh, 32 Cal.3d 621 at 635 and does not apply the legislative intent which enacted this

"special" cost statute. Clearly, the legislative intent was to reimburse the government agency for all of its costs. The Court of Appeal ruling which denied such recovery was arbitrary and capricious and violated due process of law and equal protection of the laws principles.

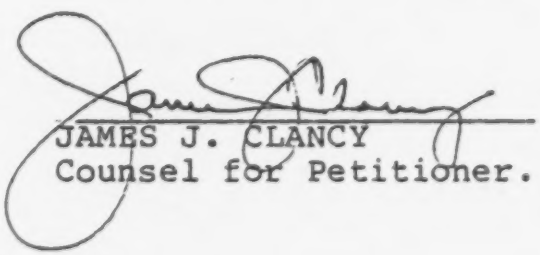
The state legislature, in authorizing an award which departs from the "reasonable attorney's fee" approach and includes a "costs of investigation" award, has set a broad base for determining the award. A fair manner of determining the amount of an award under the legislative intent expressed in Civil Code § 3496 is to apply restitutionary principals which will make the City "whole". That result was not reached in the state court below because of the cloud raised by this Court's refusal in the first petition for certiorari to decide the "closure" issue on November 30, 1981.

CONCLUSION

For all of the above reasons, the Court should grant this petition and resolve the undecided "closure" issue (which was presented in the City of Santa Ana's first petition for writ of certiorari), which has effectively prevented the City from obtaining an award of costs including a reasonable attorney's fee pursuant to Civil Code §3496 to which it is entitled.

DATED: August 27, 1985

Respectfully submitted,



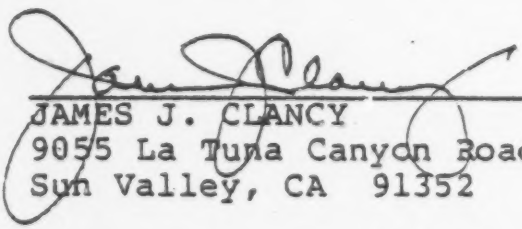
JAMES J. CLANCY
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 27th day of August, 1985, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

Law Offices of Thomas Steel
2424 Pine Street
San Francisco, California 94115



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APPENDIX A

OPINION IN PEOPLE OF THE STATE OF CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA V. MITCHELL BROTHERS' SANTA ANA THEATER, ET AL., FILED MARCH 7, 1985.

(Reference: Petition at page 2)

PEOPLE of the State of California ex rel. Edward COOPER, City Attorney of the City of Santa Ana, California, Plaintiff and Appellant,

v.

MITCHELL BROTHERS' SANTA ANA THEATER, et al., Defendants and Appellants.

E001372 (Former No. Civ. 30523).

Court of Appeal, Fourth District, Division 2.

March 7, 1985.

OPINION

MORRIS, Presiding Justice.

Plaintiff appeals from those portions of a superior court order that denied the plaintiff's motion for attorney's fees on appeal, and granted that part of defendants' motion to tax costs that objected to (1) attorney's fees as a part of costs on appeal, and (2) costs incurred in the proceedings in the United States Supreme Court.

Defendants appeal from that part of the superior court order that denied

portions of their motion to tax costs.

Some discussion of the history of this case is necessary for an understanding of the issues presented in this appeal.

Initially, both the plaintiff and defendants appealed from a judgment in an action brought by plaintiff to enjoin the showing of 17 allegedly obscene films on the ground that they constituted a public nuisance as defined by Civil Code sections 3479 and 3480. The trial was bifurcated and the case was tried in part by jury and in part to the court. The jury first decided the issues of obscenity, public nuisance, and assessed the amount of damages. Following the presentation of evidence to the jury, including the viewing of 17 films at the defendants' theater, the jury was instructed, inter alia, that a film could

be found obscene only if the jurors were convinced of such obscenity "beyond a reasonable doubt." The jury found 11 films obscene, 4 not obscene, and could not reach a verdict on the remaining 2. The jury awarded a total of $76,400 in compensatory damages.

Thereafter, the court issued its judgment and findings of fact and conclusions of law on the equitable issues. The court ruled against plaintiff in its efforts (1) to establish a constructive trust on the theater's box office receipts, (2) to revoke defendants' license, and (3) to close the theater for one year. The court ruled in city's favor by (1) permanently enjoining the exhibition or advertising by the defendants of the 11 films found obscene by the jury, (2) ordering the defendant to allow city's officers "free and total

access to all parts of the theater" for a two-year period for monitoring purposes, (3) ordering defendants to deposit $100,000 "in trust for the City... as a security deposit against future attorney fees, costs, and expenses incurred by the City" in abating future nuisances by defendants within a two-year period, (4) ordering destruction of the 11 film prints of the obscene films, and (5) awarding the city $5,869.31 in costs. (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981), 114 Cal.App.3d 923, 171 Cal.Rptr. 85.)

Both parties appealed from those portions of the judgment that were adverse to them. Also, the defendants sought reversal of a discovery order that defendants pay $5,000 in sanctions to the city's counsel for noncompliance with earlier discovery orders.

This court upheld the $5,000 discovery sanction and those parts of the judgment enjoining the defendants from advertising or exhibiting the 11 films found to be obscene beyond a reasonable doubt and denying the city's request for a constructive trust, the revocation of defendants' license, and the closure of defendants' theater. This court reversed those parts of the judgment awarding $76,400 damages to the city and ordering access to all parts of the theater for two years, the payment of $100,000 into a trust fund for further attorney's fees, and the destruction of the prints of the films. (Id.)

Inasmuch as the appeal resulted in a partial reversal of the judgment, and this court did not otherwise award costs, the remittitur, issued on May 18, 1981, included an award of costs on appeal to

defendants as the prevailing party pursuant to rule 26(b) of the California Rules of Court.

The clerk correctly interpreted rule 26(b) in that the defendants were then the prevailing party in the appeals of both plaintiff and defendants.

Defendants' appeal was on the ground, inter alia, that the relief afforded by the trial court was impermissibly broad. The partial reversal was responsive to this appeal.

Plaintiff's grounds for appeal had been rejected, including the contention that the trial court had improperly required it to prove its obscenity claim beyond a reasonable doubt. (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, supra, 114 Cal.App.3d 923, 171 Cal.Rptr. 85.)

Thereafter, the United States

Supreme Court granted certiorari on the issue of the appropriate standard of proof. The Supreme Court concluded that the United States Constitution does not require proof beyond a reasonable doubt in a civil obscenity case. Consequently, the decision of this court was reversed and the case remanded to us to determine whether under the California Constitution there is a more stringent burden of proof than the clear and convincing eyidence standard found to be the strictest standard potentially applicable under the United States Constitution. (California ex rel. Cooper v. Mitchell Bros. (1981), 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262.)

On remand this court held, "In our opinion the problem of balancing the state's interest in controlling obscenity and the individual's constitutional

right of free speech is sufficiently complex. We do not think the adoption of a different procedural rule with respect to the proof of obscenity under state law would either advance the cause of free speech or help control obscenity. Therefore, since the Supreme Court has announced that the United States Constitution does not require proof beyond a reasonable doubt, we conclude that the proper standard of proof under both the state and federal Constitutions is the 'clear and convincing evidence' standard.

". . .

"The trial court in the present case thus erred in requiring the fact of obscenity to be proved beyond a reasonable doubt. Since the court issued injunctions against only 11 of the 17 films complained of, the city attorney may again seek to enjoin the remaining 6

films. The case is remanded for further proceedings consistent with this opinion. Except for the section concerning standard of proof, we reiterate our earlier opinion (114 Cal.App.3d 923) in its entirety." (People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1982), 128 Cal.App.3d 937, 940-941, 180 Cal.Rptr. 728.)

Costs on Appeal

The remittitur, filed by the clerk of this court on June 7, 1982, awarded costs to "Respondents" as the prevailing party pursuant to rule 26(b) of the Rules of Court. Unfortunately, this order was ambiguous. Inasmuch as plaintiff had now prevailed on one issue raised in its appeal, there were now two prevailing parties. Each party had succeeded in obtaining a partial reversal of the judgment. Because this court did

not specify who was entitled to costs, the clerk attempted to enter costs as mandated by rule 26(b). The clerk designated "Respondents" in an apparent effort to recognize the fact that there was now a second prevailing party.

We now recognize that due to the complexity of the issues and the nature of the appeals, this court's opinion should have specified the prevailing parties as to each appeal. Nevertheless, because the remittitur involves two appeals and does not specify on which appeal the costs are awarded, it must be interpreted to apply to both appeals.

In any event, in the absence of an award by the court, the clerk has no discretion but must award costs pursuant to rule 26(b). Thus with respect to the appeal of plaintiff, appellant, cross-respondent People of the State of

California ex rel. City Attorney of Santa Ana, the plaintiff is the prevailing party because it has obtained a partial reversal of the judgment; and with respect to the appeal of defendants, appellants, cross-respondents Mitchell Brothers Santa Ana Theater, et al., the defendants are still the prevailing party because they have obtained a partial reversal of the judgment.

"The interpretation of a remittitur requires that the court's opinion be consulted, especially in case of ambiguity (citations), and that meaning given to it which harmonizes with the court's ruling. (Combs v. Haddock (1962), 209 Cal.App.2d

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1. California Rules of Court, rule 26(b), provides in pertinent part: "In the absence of such directions by the reviewing court the clerk shall enter on the record and insert in the remittitur a judgment for costs as follows: . . . (4) in the case of a reversal of the judgment, in whole or in part, with or without directions, for the appellant."

627, 631, 26 Cal.Rptr. 252.)"

The trial court's order awarding costs to plaintiff as the prevailing party in both appeals is reversed and the matter remanded to the trial court for further proceedings. Plaintiff is to receive the costs of its appeal and defendants are to recover costs of their appeal. The costs are to be apportioned on the basis of the portions of the transcripts and briefs devoted to each appeal. (See Baldie v. Bank of America (1950), 97 Cal.App.2d 614, 614, 217 P.2d 1011.)

Attorney's Fees

The second remittitur issued from this court on June 7, 1982.

On July 6, 1982, plaintiff filed its "Memorandum of Costs on Appeal" in which it claimed attorney's fees as a part of the costs under the "private attorney general" theory. On September 8, 1982,

plaintiff filed its Notice of Motion for an Award of Attorney's Fees on appeal, relying on Serrano v. Priest (1977), 20 Cal.3d 25, 50, 141 Cal.Rptr. 315, 569 P. 2d 1303, and California Code of Civil Procedure section 1021.5.

Subsequently, plaintiff asserted the additional right to an award of reasonable attorney's fees in reliance on newly enacted Civil Code section 3496.

Plaintiff's request for attorney's fees was denied on the grounds that Code of Civil Procedure section 1021.5 is not applicable to claims in favor of public entities, and that Civil Code section 3496 does not authorize trial courts to award fees incurred on appeal. This appeal followed.

A. Code of Civil Procedure section 1021.5 provides as follows:

"Upon motion, a court may award

attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor." (Emphasis added.)

The trial court correctly held that Code of Civil Procedure section 1021.5 is

not applicable to claims of public entities. The section expressly states that it is not applicable in favor of public entities.

Plaintiff argues that the exclusion of "public entities" in Code of Civil Procedure section 1021.5 cannot be read as excluding recovery by the city attorney of Santa Ana when he acts as a plaintiff on behalf of the residents of Santa Ana in an environmental protection lawsuit because there is no rational basis to exclude the city attorney when he acts as a plaintiff and private attorney general on behalf of the residents of the city. This argument ignores the fact that this action was a nuisance abatement action brought by the city attorney in the name of the People of the State of California. The city attorney is one of the officers authorized by law to abate

a public nuisance. (Civ.Code, §3494; Code Civ.Proc., §731.)

The city attorney was not acting as a "private" attorney general in abating the public nuisance in this case. Neither Code of Civil Procedure section 1021.5 nor the private attorney general doctrine as elucidated in Serrano v. Priest, supra, 20 Cal.3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 grant plaintiff any right to attorney's fees in this case. Furthermore, "(t)he doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important policies will as a practical matter frequently be

infeasible." (Woodland Hills Residents Assn. Inc. v. City Council (1979), 23 Cal.3d 917, 933, 154 Cal.Rptr. 503, 593 P.2d 200, emphasis added.)

This rationale has no application to the performance of official action by the governmental officers and agencies whose duty it is to prosecute such actions.

B. Civil Code section 3496 provides in pertinent part as follows:

"In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party:

"(a) in any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene

matter, as defined in Section 311 of the Penal Code." (Emphasis added.)

Civil Code section 3496 was added by Statutes 1982, chapter 1267, section 1, page 4671, and amended by Statutes 1983, chapter 1178, section 1, page 6761.[2] This section, as amended, clearly permits the court to award attorney's fees to the prevailing party, including the public entity, in certain abatement actions inasmuch as the abatement law does not otherwise provide for compensation.

Plaintiff's action to enjoin the public exhibition for commercial purposes,

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2. As originally enacted, the section provided as follows:

"3496. In a case in which the court enjoins the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees." (Stats. 1982, ch. 1267, §1, p. 4671, emphasis added.)

of obscene matter, is within the provisions of Civil Code section 3496 authorizing the court to award reasonable attorney's fees to the prevailing party. Section 3496 became effective prior to the final determination of the appeal in this case. New legislation on attorney's fees applies to all attorney fee rulings pending on appeal when the statute becomes effective, unless a manifest injustice would thereby result. (Woodland Hills Residents Assn., Inc. v. City Council, supra, 23 Cal.3d at pp. 928-934, 154 Cal.Rptr. 503, 593 P.2d 200.)[3] Accordingly, the statute authorizes the award of reasonable attorney's fees and the costs of necessary investigation and discovery as a part of costs to be

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3. Although the opinion of this court (128 Cal. App.3d 937) became final on March 18, 1982, the issue relating to attorney's fees is still pending.

awarded plaintiff on its appeal.

The trial court recognized the applicability of Civil Code section 3496 to pending cases, but failed to award attorney's fees in this case in the belief that it had no authority to award fees incurred on appeal. In this the trial court was mistaken. Under section 3496, reasonable attorney's fees may be awarded as a part of costs. The award of costs by the appellate court is a general judgment for costs, and is merely a determination that the party is entitled to recover costs, if proper proof is made to the trial court, after the remittitur goes down. (See Witkin, Cal. Procedure (2d ed. 1971) Appeal, §592, p. 4522.)

Where attorney's fees are authorized by statute they are authorized on appeal as well as in the trial court. (See T.E.D. Bearing Co. v. Walter E. Heller &

Co. (1974), 38 Cal.App.3d 59, 65, 112 Cal. Rptr. 910.) The procedure usually followed in determining attorney's fees on appeal is for the appellate court to either determine entitlement to fees and remand to the trial court for determination of amount, or to remand both the determination of entitlement and amount to the trial court. This is because generally the trial court is better equipped to resolve factual issues that may affect the award of fees. (See California Attorney's Fees Award Practice (Cont. Ed. Bar, 1982) §§9.1 - 9.6, pp. 97-101.)

In the order remanding this matter to the trial court for further proceedings, this court did not direct the trial court in the matter of attorney's fees.

Nevertheless, in view of the subsequent enactment and amendment of Civil Code section 3496, both parties, having

prevailed on appeal, became entitled to have attorney's fees considered as a part of costs. Because this court had decided neither entitlement nor amount, the trial court had full discretion to determine both issues on the motion to tax costs. In view of its determination that section 3496 does not authorize attorney's fees on appeal, it appears that the trial court failed to exercise its discretion.

Nevertheless, because we are convinced that as a matter of law the proper result was reached, it will be unnecessary for the trial court to reconsider this issue on remand. (See Pacific Legal Foundation v. California Coastal Com. (1982), 33 Cal.3d 158, 167, 188 Cal.Rptr. 104, 655 P.2d 306.)

First, in Serrano v. Unruh (1982), 32 Cal.3d 621, 635, 186 Cal.Rptr. 754, 652 P.2d 985, the Supreme Court noted

that prevailing parties are compensated for hours reasonably spent on fee-related issues. The court went on to state that when fees are unreasonably inflated, the trial court may reduce the award or deny one altogether.

Although the private attorney general doctrine is inapplicable in this case, the Supreme Court's decision in Serrano v. Unruh is helpful in determining the appropriate method of setting the amount of attorney's fees when such fees are otherwise authorized by law.

Second, although plaintiff raised more than twenty issues on its appeal, it ultimately prevailed on only one issue asserted in its appeal. Defendants prevailed on four issues raised in its appeal.[4]

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4. We have counted only those issues raised by the parties which resulted in a modification of

In Kytasty v. Godwin (1980), 102 Cal.App.3d 762, 162 Cal.Rptr. 556, the plaintiff sued to quiet title to property over which defendants claimed an easement. The trial court gave judgment for defendants, upholding defendants' right to a 60-foot easement. On appeal the judgment was modified to grant an 8 to 12-foot easement to be determined on remand. Both parties sought attorney's fees under the contract and Civil Code section 1717 providing for attorney's fees to the prevailing parties. Fees were denied on the ground that because the decision was good news and bad news to each of the parties, neither party was the prevailing party on appeal.

Under California Rules of Court,

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the trial court's judgment, inasmuch as that was the basis upon which costs were awarded. (Cal. Rules of Court, rule 26(b).)

rule 26(b), plaintiff could only be held to be the prevailing party on its appeal. Moreover, of the multitude of issues raised in its appeal, it ultimately prevailed on only one--the burden of proof. In plaintiff's 272-page opening brief filed in this court, only six pages were devoted to the burden of proof issue.[5] Plaintiff's subsequent petitions to the California and the United States Supreme Courts were similar in their devotion to extraneous issues. Even on remand to this court plaintiff's supplemental brief and arguments were largely devoted to seeking to persuade this court to reconsider its previous decision on other issues, as were its subsequent petitions to the California and United States

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5. It also included a 317-page "Expanded Statement of Facts" which had no relevance to the issue.

Supreme Courts.[6]

In view of the great disparity in the preparation time necessarily devoted to the sole issue on which plaintiff prevailed on its appeal to the time devoted to other issues, any reasonable consideration of the plaintiff's entitlement to a fee award must find it outweighed by time devoted to issues on which plaintiff did not prevail.

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6. As noted in our first opinion in this appeal, "Some mention of the City's opening brief is necessary. Rarely has there been such a total disregard for that section of Rule 13 of the Rules of Court which requires the statement of the case to be '(set) forth concisely.' The 'brief' spans 272 pages (at 36 lines to the page) and is supplemented by a 317-page 'Expanded Statement of Facts.' While such a large document is occasionally helpful (Conaway v. Yolo Water & Power Co. (1928), 204 Cal. 125, 127 (266 P. 944)), most often, as here, it is not. (King v. Gildersleeve (1889), 79 Cal. 504, 507-508 (21 P. 961); Couts v. O'Neill (1921), 51 Cal.App. 152, 158 (196 P. 109).)" (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, supra, 114 Cal. App.3d at p. 929, fn. 5, 171 Cal.Rptr. 85.)

We now add that the same disregard for the Rules of Court has continued to plague this case.

Moreover, we have searched the record in vain for any showing by plaintiff in the trial court with respect to the time actually spent on issues on which plaintiff prevailed either on its appeal or on defendants' appeal. Under the circumstances above described and absent any showing to substantiate plaintiff's claim with respect to the issue on which plaintiff did prevail, we find that the trial court properly denied attorney's fees to plaintiff in this case.

In view of the fact that defendants made no claim under Civil Code section 3496, the issue of attorney's fees will not be remanded to the trial court for further consideration.

In light of the above ruling, it is unnecessary for this court to consider defendants' additional contention relating to the constitutionality of section

3496.

Moreover, because this case must be remanded to the trial court so that it may properly apportion costs on the two appeals, it is unnecessary for this court to consider defendants' contentions with respect to the adequacy of plaintiff's documentation of its remaining costs on appeal.

There is one additional issue that does require resolution. That is whether the trial court correctly denied plaintiff's request for costs of printing its petition in the United States Supreme Court. We hold that it did. United States Supreme Court Rule 50.3 provides as follows: "The fees of the Clerk and the costs of serving process and printing the joint appendix in this Court are taxable items. The costs of the transcript of record from the court below is also a

taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable." (Emphasis added.)

The California Supreme Court in Sacramento M.U. Dist. v. P. G. & E. Co. (1942), 20 Cal.2d 684, 690, 128 P.2d 529, long ago recognized that ". . . as to matters of costs in actions in the federal courts, the United States statutes when they cover the subject are controlling, and may not be regulated by state statutes which result in penalizing the free access to the federal courts in proper cases."

The Supreme Court, assuming that the subject of costs was wholly covered by federal statute, went on to distinguish the attorney's fees allowed by the state statute there involved from costs. The

court concluded that the state statute allowing attorney's fees (Code Civ.Proc. §526(b)) created an independent substantive right, and did not attempt to regulate the practice and procedure in relation to costs in the federal court.

It is otherwise in the instant case. Plaintiff is asking this court to require the trial court to award plaintiff the cost of printing its petition in the Supreme Court.

That matter is explicitly covered by the federal rule, enacted pursuant to the authority of federal statute. (28 U.S.C. A. §2071.)

Disposition

The trial court's order awarding costs to plaintiff as the prevailing party on both appeals in People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater is reversed and the matter

remanded to the trial court for further proceedings consistent with this opinion.

The trial court's order denying the plaintiff's motion for attorney's fees on appeal and denying costs incurred in the proceedings in the United States Supreme Court are affirmed.

Each party is ordered to bear its own costs, including attorney's fees, on this appeal.

KAUFMAN and RICKLES, JJ., concur.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 29 1985

I have this day filed Order

REVIEW DENIED

In re: *No.* F001372

PEOPLE

vs.

MITCHELL BROTHERS' SANTA ANA ETC.

Respectfully,

Clerk

B4- 32942

APPENDIX B

CALIFORNIA STATUTORY PROVISIONS INVOLVED.

(Reference Petition at page 2)

Civil Code § 5. Provisions similar to existing laws, how construed

The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

Civil Code § 22.2. [Common law, when rule of decision]

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Civil Code § 3366. [Specific relief, etc., when allowed]

Specific or preventive relief may be

given as provided by the laws of this state.

Civil Code § 3367. Specific relief, how given

Specific relief is given:

1. By taking possession of a thing, and delivering it to a claimant;

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

Civil Code § 3368. Preventive relief, how given

Preventive relief is given by prohibiting a party from doing that which ought not to be done.

Civil Code § 3369. [Relief not granted to enforce penalty, forfeiture or penal law: Exceptions: Unfair competition enjoinable: Definitions: Who may prosecute actions]

1. Neither specific not preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. . . .

3. . . .

4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public.

Civil Code § 3479. [Nuisance, what]

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

Civil Code § 3480. [Public nuisance]

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Civil Code § 3481. Private nuisance.

Every nuisance not included in the definition of the last section is private.

Civil Code § 3482. What is not deemed a nuisance.

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Civil Code § 3483. Successive owners.

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it.

Civil Code § 3484. Abatement does not preclude action

The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

Civil Code § 3490. Lapse of time does not legalize

No lapse of time can legalize a public nuisance, amounting to an actual

obstruction of public right.

Civil Code § 3491. [Remedies against public nuisance]

The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement.

Civil Code § 3492. [Remedy regulated, how]

The remedy by indictment or information is regulated by the Penal Code.

Civil Code § 3493. Remedies for public nuisance

A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

Civil Code § 3494. Action

A public nuisance may be abated by any public body or officer authorized thereto by law.

Civil Code § 3495. How abated

Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

Civil Code § 3523. For every wrong there is a remedy.

Gov't Code § 38771. Declaration of nuisance

By ordinance the city legislative body may declare what constitutes a nuisance.

Gov't Code § 38773. Summary abatement of nuisances

The legislative body may provide for the summary abatement of any nuisance at the expense of the persons creating, causing, committing, or maintaining it and by ordinance may make the expense of abatement of nuisances a lien against the property on which it is maintained and a personal obligation against the property

owner.

Gov't Code § 38773.5. Cost of abatement of a nuisance upon land made a special assessment: Levy, collection and enforcement of assessment

The legislative body may by ordinance establish a procedure for the abatement of a nuisance and make the cost of abatement of a nuisance upon a parcel of land a special assessment against that parcel. The assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

Code of Civil Procedure § 731. [(Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance]

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers

shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

Code of Civil Procedure § 1021. [Compensation of attorneys: Costs and disbursements to parties]

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Code of Civil Prodedure § 1021.5. [Attorney fees in cases resulting in public benefit]

Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Code of Civil Procedure §1034. [Costs on appeal]

In appeals from the superior and municipal courts, costs shall be awarded as provided in rules adopted by the Judicial Council. In appeals from other courts, the prevailing party on appeal shall be entitled to his costs excepting when judgment is modified and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by the party in connection with the appeal, and the preparation of the record for the appeal. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record.

Whenever costs are awarded to a party by an appellate court, if the party claims

such costs, the party must, within 30 days after the remittitur is filed with the clerk below, serve upon the adverse party and file with such clerk a memorandum of costs, verified as prescribed by Section 1033. The party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after service of a copy of the bill of costs, as prescribed by Section 1033. After the costs have been taxed, or the time for taxing the costs has expired, the award of costs may be enforced in the manner provided for enforcement of a money judgment.

Code of Civil Procedure §3496. [Costs and fees in obscenity, gambling, lewdness, assignation, and prostitution cases]

In any of the following described cases, the court may award costs, including the costs of investigation and

discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party:

(a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

(b) in any case in which a governmental agency seeks to enjoin the use of a building or place for the purpose of illegal gambling, lewdness, assignation, or prostitution; or any case in which a governmental agency seeks to enjoin acts of illegal gambling, lewdness, assignation, or prostitution in or upon a building or place, as authorized in Article 2 (commencing with Section 11225) of Chapter 3 of Title 1 of Part 4 of the Penal Code.

Penal Code §311. [Definitions.] As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

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(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(3) In determining whether the matter

taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor which can be considered in making such a determination.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer pos-

session of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

Penal Code §311.2 [Sale or distribution, etc., of obscene matter.] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others

for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars ($50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city

or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision (c), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

Penal Code §370. [Public nuisances defined.] Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free

use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

Penal Code §371. [Unequal damage.] An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

Penal Code §372. Maintaining a nuisance, a misdemeanor. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform

any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Penal Code §373a. [Maintaining or permitting public nuisance after abatement notice: Each day's existence a separate offense: Duty of district attorney.]

Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, and every person occupying or leasing the property or premises of another who maintains, permits or allows a public nuisance to exist thereon, after reasonable notice in writing from a health officer or district attorney or city attorney or prosecuting attorney to remove, discontinue or abate the same has been served upon such person, is guilty of a misdemeanor, and shall be punished accordingly; and the existence of such nuisance for each and every day after the service of such notice shall be deemed

a separate and distinct offense, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes the duty upon the city attorney to prosecute state misdemeanors, to prosecute all persons guilty of violating this section by continuous prosecutions until the nuisance is abated and removed.

U.S. CONSTITUTION, AMENDMENT I

Congress shall made no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONSTITUTION, AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONSITUTION, AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.